Immigration Litigation Bulletin

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SUPREME COURT DENIES GOVERNMENT'S REQUEST TO STAY RELEASE OF DETAINED CRIMINAL ALIEN

On November 12, the Supreme Court, without opinion, denied the government's application for a stay of the September 29 decision of the district court for the Western District of Washington (Lasnik, J.) ordering Ma's release from immigration custody. This order was referred to the Court by Circuit Justice O'Connor, who had on November 2 temporarily stayed the order pending further briefing. ***Reno v. Ma,*** __ U.S. __, No. 99A359 (U.S. Nov. 2, 1999). The practical consequence of the Supreme Court's ruling likely will be that criminal aliens, who cannot be currently deported to their home country, will be ordered released by district courts, especially within the jurisdiction of the Ninth Circuit.

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In this case, the respondent Kim Ho Ma, a Cambodian, had been ordered removed from the United States based on his first degree manslaughter conviction. Ma brought a *habeas action* challenging the constitutionality of his continued detention while the INS seeks to return him to Cambodia. His was one of the five lead cases designated for expedited briefing and oral argument out of approximately 120 similar *habeas* petitions pending in the Western District of Washington.

The district court concluded that Ma's post-order detention under INA ' 241(a) violated his rights to substantive and procedural due process. The government appealed and unsuccessfully sought a stay from the Ninth Circuit. In its stay application to the Supreme Court, the government pointed out that the district court's release order could affect about 120 similar *habeas* cases pending in the Western District of Washington and approximately 500 similar *habeas* cases pending in other

(Continued on page 2)

EAJA FEES DENIED IN CLASS ACTION BIVENS CASE

In ***Dinh v. Reno***, __F.3d__, 1999 WL 1043958 (10th Cir. Nov. 18, 1999), the Tenth Circuit (Tacha, *McKay*, Murphy) denied fees under the Equal Access to Justice Act in light of its finding that INA '' 242(a)(2)(B)(ii) and 242(f) deprived the district court of subject matter jurisdiction over the underlying *Bivens* class-action.

The aliens, detainees at INS's Wackenhut contract detention facility in Aurora, Colorado, brought the class-action to obtain their release or prevent their transfer to an out-of-state detention facility. They claimed, *inter alia*, that if moved to a remote area they would be denied their right to counsel. At the time of the filing of

(Continued on page 2)

LAWSUITS CHALLENGE INS' ADMINISTRATION OF INVESTOR VISA PROGRAM

The INS's administration of the "immigrant investor" visa program is currently being challenged in several class actions lawsuits brought in U.S. district courts.

To qualify for a preferred visa status under INA ' 203(b)(5), an alien must be "seeking to enter the United States for the purposed of engaging in a new commercial enterprise," 8 U.S. C. ' 1153(b)(5)(A) (Supp. IV 1998), "which the alien has established," *id.* ' 1153(b)(5)(A)(i) (Supp. IV 1998), and "which will benefit the United

(Continued on page 3)

Highlights Inside

EAJA FEES DENIED IN BIVENS CASE

(Continued from page 1)

the lawsuit, INS did not know whether its contract with the detention facility would be renewed. Initially the district court entered a TRO against the INS. However, after the INS renewed its contract, the *Bivens* action was dismissed as moot.

Subsequently, plaintiffs unsuccessfully sought EAJA fees from the district court. On appeal, plaintiffs argued that they were entitled to an EAJA award because the district court's TRO had precluded their transfer out of the Denver area. The Tenth Circuit held that EAJA fees could not be awarded in this class-action *Bivens* case because INA ' 242(a)(2)(B)(ii) (barring jurisdiction over the Attorney General's discretionary decisions) and ' 242(f) (barring injunction against operation of the INA other than in individual cases) prohibited the relief sought and barred the district court's exercise of jurisdiction.

> "A district court has no jurisdiction to restrain the Attorney General's power to transfer aliens to appropriate facilities by granting injunctive relief in a Bivens class action suit."

In particular, the court found that "a district court has no jurisdiction to restrain the Attorney General's power to transfer aliens to appropriate facilities by granting injunctive relief in a *Bivens* class action suit." The court noted, however, that its holding had "no application to constitutional *habeas* claims brought pursuant to 28 U.S.C. § 2241."

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SUPREME COURT DENIES GOVT'S STAY REQUEST

(Continued from page 1)

judicial districts within the Ninth Circuit.

On the merits, the government argued that the district court's due process ruling in the five lead cases (which included Ma's), and Ma's release constituted an unwarranted judicial intrusion into the Attorney General's administration of the immigration laws and ushers in a widespread disruption of the INS's orderly administration and review of the custody of the many similarly-situated aliens. In support, the government cited *Zadvydas v. Underdown*, 185 F.3d 279 (5th Cir. 1999), and *Ngo v. INS*, __F.3d__, 1999 WL 744015 (3d Cir. Sept. 15, 1999), both of which sustain the detention of aliens in comparable circumstances and criticize the district court's due process ruling in this case.

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HEALTH CARE IMMIGRATION BILL SIGNED INTO LAW

On November 12, 1999, the President signed into law, H.R. 441, a bill amending the INA with respect to the requirements for the admission of nonimmigrant nurses who will practice in health professional shortage areas. (P.L. 106-95)

Among other provisions, the law requires the government to grant national interest waivers to foreign physicians who make a long term commitment to work in an area where there are shortages of doctors.

Solicitor General Establishes New Timing Guidelines In Civil Division Cases

In an effort to improve the decisionmaking process, the Solicitor General, Seth P. Waxman, has established new timing guidelines in Civil Division cases. Finding that the current "regime of late, hurried decisionmaking benefits no one," the Solicitor General requests that "the government's decisionmaking process begin as soon as an adverse decision is rendered." Consequently, he instructs the General Counsels of Executive Departments and Agencies, and all United States Attorneys, to fax a copy of any adverse decision to the Civil Division Appellate Staff as soon as they receive it.

The times within which recommendations must reach the Solicitor General's Office, and consequently, the Civil Division Appellate Staff, have been shortened. For example, under the new guidelines which become effective for court decisions issued after January 1, 2000, recommendations to the Civil Division Appellate Staff must be submitted by the agency, U.S. Attorneys, and OIL, under the following timelines:

Appeal	21 days
Rehearing	14 days
Certiorari	21 days

Although the Solicitor General indicated that the timelines "must be strictly adhered to," he also recognized that "there would be a few highly unusual cases in which adherence to the deadlines is simply impossible."

The Solicitor General indicated that after six months of operation, he will review the timelines with the Civil Division taking into account comments from other government offices.

INS' IMPLEMENTATION OF INVESTORS' PROGRAM CHALLENGED

(Continued from page 1)

States economy and create full-time employment for not fewer than 10 U. S. citizens" or lawful aliens, *id*. ' 1153(b)(5)(A)(iii) (Supp. IV 1998). First enacted in 1990, this is the fifth preference within the "employment-based" visa preference category, and for that reason, the immigrant investor program is commonly referred to as the "EB-5" program.

In order to achieve the statute's employment-creation goals, specific capitalization requirements are imposed. The alien must have invested or be "actively in the process of investing" at least $1,000,000 in the new commercial enterprise, unless the investment is to be made in a "targeted employment area," in which case the investment must be at least $500,000. 8 U.S.C. '' 1153(b)(5)(C)(i)-(ii) (Supp. IV 1998).

The INS's implementing regulations require that the investment made by the alien must be in the nature of equity "placed at risk for the purpose of generating a return on the capital placed at risk."

The INS's implementing regulations require that the investment made by the alien must be in the nature of equity "placed at risk for the purpose of generating a return on the capital placed at risk." 8 C.F.R. ' 204.6(j)(2) (1999). This does not include debt contributions "in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise . . . ." *Id.* ' 204.6(e) (1999). Such debt arrangements are not capital contributions for EB-5 purposes. *Id*. Multiple investments into the same enterprise are allowed, as long as each alien separately meets the statutory and regulatory requirements. *Id*. ' 204.6(g) (1999).

An alien seeking to obtain lawful permanent residence in the United States under the EB-5 statute must first file an "I-526" petition setting forth information about himself and his proposed qualifying investment. If the petition is approved, the immigrant investor (and his dependents, if any) are admitted for permanent residence, but on a conditional basis. *See* INA ' 216A(a)(1), 8 U.S.C. ' 1186b(a)(1) (Supp. IV 1998). He must subsequently file an "I-829" petition to have the conditional status removed within the 90-day period before the second anniversary of his lawful admission for permanent residence. *See* INA '' 216A(c)(1), (d)(2), *id.* '' 1186b(c)(1), (d)(2) (Supp. IV 1998). The petition will be granted if the INS determines that the alien sustained the required investment and entrepreneurial activities during the period of his conditional residency. *See* INA ' 216A(d)(1), *id*. ' 1186b(d)(1) (Supp. IV 1998).

Beginning in 1996, EB-5 applications began to be presented to the INS that involved complex financial arrangements, including pooled investments and limited partnerships. INS adjudicators approved some of these arrangements in a series of unpublished orders, but the Service became concerned that some of the arrangements' features, which included a rise in what appeared to be debt investments, might not be consistent with the regulations and the job-creation purpose of section 203(b)(5). The INS determined that it was necessary to provide guidance to its adjudicators through the issuance of published decisions, which would be binding on all INS employees in their administration of the statute.

Accordingly, in the summer of 1998, the INS published four decisions addressing a number of substantive issues that had arisen under the EB-5 program. *Matter of Soffici*, Int. Dec. No. 3359, __ I&N Dec. __, 1998 WL 471519 (Exam. Com. June 30, 1998); *Matter of Izumii*, Int. Dec. No. 3360, __ I&N Dec. __, 1998 WL 483977 (Exam. Com. July 13, 1998); *Matter of Hsiung*, Int. Dec. No. 3361, __ I&N Dec. __, 1998 WL 483978 (Exam. Com. July 31, 1998), and *Matter of Ho*, Int. Dec. No. 3362, __ I&N Dec. __, 1998 WL 483979 (Exam. Com. July 31, 1998). Of particular significance, *Izumii* held that, for purposes of meeting the statutory and regulatory "investment" requirements, an alien may not enter into an agreement, prior to the end of the two-year period of conditional residence, that grants him the right to sell his interest back to the partnership or other enterprise. Such an agreement, it was held, converts the alien's capital from what is meant to be an equity investment with the risk of gain or loss, into a loan. *Izumii* also found that a promise that the alien will receive a return on his money similarly indicates that the alien has made a loan to the enterprise rather than an equity investment.

Several lawsuits have been brought in U.S. district courts around the country challenging the INS's actions. At present, these include *R.L. Investment Limited Partners v. INS*, Civ. No. 98-00943 (D. Haw.); *American Export Group Limited Partnership v. United States*, Civ. No. 2:99-1124-12 (D. S.C.); *Golden Rainbow Freedom Fund v. Reno*, No. C99-0755C (W.D. Wa.); *Ahn v. United States*, No. C99-10518 (C.D. Ca.); *Spencer Enterprises, Inc. v. United States*, No. CIV F-99 6117 OWW LJO (E.D. Ca.); and *Soemantri v. INS*, No. CV 99-07012 DDP (C.D. Ca.). Generally, the plaintiffs in these actions contend that *Izumii* and the other precedent decisions were

(Continued on page 4)

Investor Litigation

(Continued from page 3)

wrongly decided, that the INS violated the Administrative Procedures Act by instituting new policies and standards for the EB-5 program without a notice-and-comment rulemaking, and that the INS should be estopped from abandoning its previous policies. In addition, the complaints in *Golden Rainbow* and *Ahn* seek damages. The plaintiffs in *Golden Rainbow* sought a preliminary injunction, which was denied. A similar motion has been filed in *Spencer Enterprises*, OIL has filed an opposition, and a hearing is scheduled for December 9, 1999. Cross-motions for summary judgment have been filed in *R.L. Investment*, and a hearing is scheduled for January 18, 2000.

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PRESIDENT BARS ENTRY OF CERTAIN OFFICIALS FROM FEDERAL REPUBLIC OF YUGOSLAVIA

On November 12, 1999, President Clinton issued a Presidential Proclamation suspending the entry into the United States of certain officials from the Federal Republic of Yugoslavia. 64 *Fed. Reg*. 62561 (November 17, 1999).

The President determined that these officials, including Slobodan Milosevic, were responsible for the repression of the civilian population in Kosovo and formulated policies to obstruct or suppress freedom of the speech or of the press in the FRY, Serbia, Montenegro, or Kosovo.

In asserting his authority to deny entry to these individuals, the President invoked his presidential powers and INA § 212(f).

VOLUNTARY DEPARTURE
What It Is And Isn't

A grant of "voluntary departure" in lieu of physical expulsion is available to eligible applicants in the exercise of the Attorney General's discretion under INA ' 240B, 8 U.S.C. ' 1229c (as amended 1996; formerly found in INA ' 244(e), 8 U.S.C. ' 1254 (e) (1994)). Voluntary departure permits recipients who leave within the time allowed to escape the stigma of deportation, select their own destination, and avoid the bar to reentry to the United States which is a consequence of compelled deportation. *See* 8 C.F.R. '' 240.25, and .26 (as amended 1998); *Shaar v. INS*, 141 F.3d 953, 957 n.2 (9th Cir. 1998); *Strantzalis v. INS*, 465 F.2d 1016, 1017 (3d Cir. 1972). Failure to depart voluntarily within the time granted, however, triggers the deportation order:

> Such a grant of voluntary departure usually comes in the form of an "alternate order of deportation." Using this procedure, the immigration judge completes the proceedings, finds the alien deportable, and grants a stated period for voluntary departure, but at the same time orders formal deportation if the alien has not left by the deadline date. Thus, the INS may seize and deport a noncomplying alien without having to initiate further proceedings before the immigration judge. But if the alien leaves in a timely fashion, he or she is not considered to have departed under a deportation order.

D. Martin, ?*Major Issues in Immigration Law*" at 73 (Fed. Judicial Center 1987).

Voluntary departure is a matter of privilege, rather than of right. Its purpose is to allow an alien to leave without stigma or the adverse consequences of deportation.

Voluntary departure is a matter of privilege, rather than of right. Its purpose is to allow an alien to leave without stigma or the adverse consequences of deportation. It is not to allow the alien to accrue new rights to remain. *Shaar v. INS*, 141 F.3d 953, 957 n.2 (9th Cir. 1998). Aliens who wait until the eve of their scheduled departure to ask for additional immigration relief generally are viewed as having "attempted to manipulate the system." Id. at 959. An alien's motion to reopen his or her deportation proceeding based on "events which occurred subsequent to [their] failure to depart" normally will be disfavored. *Platero-Reymundo v. INS*, 807 F.2d 865, 867 (9th Cir. 1987).

The 1996 IIRIRA amendments codified the preexisting common law rule that aliens seeking voluntary departure must establish by clear and convincing evidence that they have the ability to leave at their own expense and that they intend to do so. INA ' 240B(b)(1)(D), 8 U.S.C. ' 1229c(b)(1)(D); *Cuadras v. U.S. INS*, 910 F.2d 567, 572 (9th Cir. 1990). The grant or denial of voluntary departure is not subject to judicial review. INA § 240B(f), 8 U.S.C. § 1230(f).

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Contributions To The ILB Are Welcomed!

INS SETS NEW REMOVAL RECORDS

According to the INS, the removal of criminal (and other illegal aliens) reached 176,990 at the end of FY 1999, up 3 percent from FY 1998. The removals include 62,359 criminal removals and 114,631 non-criminal removals. Criminal alien removals increased 12 percent over FY 1998's total of 55,639. INS is now removing more than 1,199 criminals every week. Drug convictions (47 percent), criminal violations of immigration law (13 percent), convictions for assault (6 percent), and burglary (5 percent) accounted for most of the criminal alien removals.

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The expedited removal process -- which was established by Congress to remove aliens who arrive at ports of entry with fraudulent, improper, or no entry documents -- removed 89,035 illegal aliens for the fiscal year, an increase of approximately 16 percent over 1998 levels.

The largest increase in criminal removals occurred in the Institutional Removal Program (IRP -- formerly the Institutional Hearing Program), a national effort to identify, charge, and conduct removal proceedings for convicted criminal aliens while they are still serving their prison sentences so that they can be immediately removed from the United States upon completion of their sentences. The IRP is a cooperative effort of INS, the Executive Office for Immigration Review (EOIR), and participating federal and state correctional agencies.

A total of 19,592 criminal aliens were removed through the IRP program in FY 1999, a nearly 45 percent increase over FY 1998, when the INS removed 13,545 aliens through the IRP. "Improvements we have made over the past year have allowed us to achieve excellent results from the IRP program in Fiscal 1999," said Doris M. Meissner, INS Commissioner. "We are very pleased that the exceptional efforts of INS field personnel, combined with excellent cooperation from our federal partners as well as state and local officials, have allowed us to remove criminal aliens who have completed their sentences with greater efficiency and effectiveness."

Included in the overall removal numbers for the year are 9,283 administrative removals -- the deportation of convicted aggravated felons who are not legal permanent residents, are not eligible for relief from deportation, and are ordered removed by INS officers. The number of administrative removals nearly doubled in the past year, up from 5,833 in FY 1998.

The IRP continues to be a key element in the Administration's strategy for improving immigration enforcement. INS targeted resources to seven states -- Arizona, California, Florida, Illinois, New Jersey, New York, and Texas --which account for 75 to 80 percent of all foreign-born state inmates nationwide. Currently, the IRP operates at 11 sites in the federal Bureau of Prisons and in 40 states, the District of Columbia, and Puerto Rico.

The removal figures include only those removed based on a final order of removal issued by an immigration judge or immigration officer. The figures do not include an additional 72,000 aliens in INS custody who were allowed to voluntarily depart the United States after being charged with a violation of immigration law. The removal figures also do not include approximately 1.5 million apprehensions and voluntary returns at U.S. borders during FY 1999.

FINAL ORDER REMOVALS

TOP NATIONALITIES

Country	Total Removals	Criminal Removals
Mexico	147,336	48,047
El Salvador	3,817	1,930
Guatemala	3,213	981
Honduras	1,042	1,085
Dominican Rep.	3,115	2,283
Colombia	2,003	1,469
Jamaica	1,984	1,342
Canada	970	514
Ecuador	752	161
Peru	700	192
Brazil	611	49
Philippines	520	286
Nigeria	451	274
Haiti	431	293

REMOVALS BY INS DISTRICT OFFICE

District	FY 1999 Removals
San Diego	65,540
Phoenix	19,808
El Paso	16,769
Los Angeles	9,243
Houston	6,792
Dallas	4,511
San Francisco	4,204
New York	4,005
Miami	3,334
Atlanta	2,358
Chicago	1,874
Philadelphia	1,558

Recently Published Decisions From The BIA

NACARA & *Matter of N-J-B-*

On August 20, 1999, the Attorney General remanded *Matter of N-J-B-*, 21 I. & N. Dec. 812 (BIA, AG 1997), to the Board for a determination of the alien's eligibility for adjustment of status under section 202 of the Nicaraguan Adjustment and Central American Relief Act. *See Matter of N-J-B-*, Int. Dec. 3515 (BIA, AG 1997; AG 1999).

In *Matter of N-J-B-*, the Board found that the service of an Order to Show Cause ended the period of continuous physical presence required for suspension of deportation under section 244 of the INA. After the Attorney General vacated the Board's decision pending her review, the NACARA was signed into law, and it codified *Matter of N-J-B-*'s stop-time rule with an exception for aliens from certain Central American and Eastern European countries. In addition, section 202 of the NACARA allows eligible Nicaraguan and Cuban nationals to adjust status to permanent residence.

The alien in *N-J-B-* is a Nicaraguan citizen. Accordingly, after the alien moved to reopen her case to apply for adjustment of status under the NACARA, the Attorney General remanded the case to the Board for consideration of her NACARA motion. The Attorney General directed the Board to remand the case to the Immigration Judge for adjudication of the adjustment of status application if it determines that the alien is not clearly ineligible for the requested relief.

Aggravated Felony: Driving While Intoxicated

In *Matter of Puente*, Int. Dec. 3412 (BIA 1999), the *en banc* Board held that Texas felony offense of driving while intoxicated was a crime of violence and therefore an aggravated felony. The Board reasoned that the inherent nature of DWI, as statutorily defined by Texas law, is a crime of violence under 18 U.S.C. ' 16(b) because the offense may create a substantial risk that physical force will be used against the person or property of another. The Board rejected the alien's argument that ' 16(b) limits crimes of violence to intentional crimes and found that '16(b) includes the reckless exertion of force. Finally, the Board rejected the argument that ' 16(b) requires a finding that a deadly weapon was used.

The Fifth Circuit Court of Appeals adopted similar reasoning in *Camacho-Marroquin v. INS*, 188 F.3d 649 (5th Cir. 1999), which was decided on the same day as *Puente*. In *Camacho-Marroquin*, the court concluded that the alien's conviction for DWI under Texas law was an aggravated felony and, therefore, precluded the exercise of appellate jurisdiction to review the final order of removal.

> The *en banc* Board ruled that it will not use its certification authority to reopen or reconsider a case when intervening law merely modifies the assessment of an alien's case.

Mandatory Detention for Criminal Aliens

In *Matter of Adeniji*, Int. Dec. 3417 (BIA 1999), the Board found that criminal aliens released from criminal custody prior to October 9, 1998 are not subject to mandatory detention under section 236(c) of the INA and are eligible for release on bond provided the alien can satisfy the dangerousness and flight risk prongs of the detention inquiry. The Board reasoned that the statutory language of IIRIRA ' 303(b)(2), although not completely free from ambiguity, appeared to establish a requirement that ' 236(c)'s mandatory detention provision only apply to aliens released from criminal custody after the expiration of the Transition Period Custody Rules, or October 9, 1998. Both parties, the Board emphasized, agreed to this construction. The Board also suggested that this reading did not necessarily lead to an anomalous result that the Board could not ignore, because the regulations precluded the release of these criminals aliens if they posed a danger to the community or a risk of flight.

The BIA's Certification Powers

In *Matter of G-D-*, Int. Dec. 3418 (BIA 1999), the *en banc* Board ruled that it will not use its certification authority to reopen or reconsider a case when intervening law merely modifies the assessment of an alien's case, but does not obviously compel a different result. In this case, the alien moved the Board to reconsider his asylum case in light of intervening decisions of the Board and Seventh Circuit. The alien's reconsideration motion was untimely filed, but he asked the Board to consider his motion *sua sponte* pursuant to 8 C.F.R. ' 3.2(a). The Board declined to invoke jurisdiction on its own authority because the intervening change in law was not a fundamental or radical change but rather merely represented an incremental development in the law.

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Summaries Of Recent Federal Court Decisions

ASYLUM

■First Circuit Upholds BIA's Adverse Credibility Finding In Asylum Case Filed By Salvadoran National

In ***Bojorques-Villanueva v. INS***, 194 F.3d 14 (1st Cir. 1999), the First Circuit (Boudin, *Coffin*, Campbell) upheld the BIA's adverse credibility finding in an asylum case involving a national from El Salvador. The court held that the petitioner had presented testimony and evidence that were internally inconsistent and thus incredible. It found that the evidentiary conflicts, which were more than "mere gossamer threads," could not all be attributed to "difficulties of language and understanding." Moreover, the multiple inconsistencies went to the central facts of petitioner's asylum claim. Accordingly, the court found "no principled basis for reversing the Board's decision short of saying that an appellate court can conduct *de novo* review of every non-frivolous case involving non-English speaking parties. This we cannot do."

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■Fourth Circuit Upholds Denial Of Chinese National's Coercive Family Planning Asylum Claim

In ***Chen v. INS***, __ F.3d__, 1999 WL 957741 (4th Cir. Oct. 20, 1999), the Fourth Circuit (Widener, *Motz*, Butzner) upheld the BIA's denial of asylum to a national from the People's Republic of China who claimed that he faced persecution under that country's coercive family planning policies. The petitioner and his wife sought asylum based on the statutory ground of resistance to coercive family planning policies.

The court held that by amending the refugee definition in 1996, "Congress directed that an individual in fear of a population control program would be able to qualify for refugee status even in the absence of a showing of past persecution." The court noted that such definition as applied to the China's population control policy, encompasses "an extraordinarily large and diffuse class of individuals. The court found, given the evidence in the record indicating sporadic enforcement of the policy, that a stronger showing of individual targeting is required.

"Congress directed that an individual in fear of a population control program would be able to qualify for refugee status even in the absence of a showing of past persecution."

Here, Chen had failed to show that he would be at particular risk upon return to China and had failed to rebut the evidence suggesting that his subgroup -- persons returning with an additional child from university study abroad -- is treated with particular leniency under the one child policy. However, the court indicated that if Chen had offered evidence of the specific terms of the agreement that he and his wife had allegedly signed during their first pregnancy, and if those terms had suggested that he would be individually targeted for involuntary sterilization upon his return to China, the evidence might have been sufficient to support an application for asylum.

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■Seventh Circuit Affirms Asylum Denial To Romanian

In ***Dobrata v. INS***, __F.3d__, 1999 WL 988976 (7th Cir. Nov. 1, 1999), the Seventh Circuit (Eschbach, *Flaum*, Kanne) affirmed the BIA's denial of a Romanian citizen's asylum claim. The court took judicial notice of the State Department's current report on conditions in Romania and held that although it was disturbed by the BIA's 6-year delay and its failure to mention material submitted on petitioner's behalf by a former United States ambassador, remand of the case was futile in light of favorable current country conditions.

The court found that although petitioner's conviction and imprisonment for damaging public property and disturbing the public silence occurred because of his political views, his 3-month incarceration was not severe enough to warrant a grant of asylum; and that petitioner's ability to obtain a passport showed his future persecution was unlikely.

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■First Circuit Affirms BIA's Denial Of Asylum And Finds No Violation Of Due Process

In ***Morales v. Reno***, __F.3d.__, 1999 WL 897658 (1st Cir. Oct. 19, 1999), the First Circuit (*Boudin*, Bownes, Stahl) affirmed the BIA's asylum denial and found no due process violation. The court held that although the immigration judge may have been "somewhat impatient," he did not deny Morales a full and fair hearing on his asylum claim. It found that the immigration judge did not deny Morales due process by restricting his testimony because his attorney made offers of proof which the judge accepted as true. The court further held that neither the immigration judge nor the BIA need address each claim an applicant makes or each piece of evidence he presents. Finally, it concluded that the record compelled no finding of persecution on

(Continued on page 8)

Summaries Of Recent Federal Court Decisions

(Continued from page 7)
account of labor union membership because Morales was not an active participant in labor union activities.

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■Ninth Circuit Reverses Asylum Denial, Finding Mixed Motive In Persecution Where Peruvian National Had Been Threatened By Shining Path

In ***Del Aguila v. INS***, No. 98-70306 (9th Cir. Oct. 22, 1999) (unpublished), the Ninth Circuit granted the review petition of a Peruvian gold miner who sought asylum based on extortion by the Shining Path. Petitioner paid the Shining Path in gold for many months, was repeatedly threatened with death when he ceased payment, and was put on trial and sentenced to death for being a traitor to its cause. The BIA concluded that these events did not constitute persecution on account of political opinion or social group membership. The court held that the mixed motive for the persecution included petitioner's political opinion.

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■Ninth Circuit Grants Petition For Review And Remands To BIA

In ***Nabi v. INS***, No. 98-70187 (9th Cir. Oct. 7, 1999)(unpublished), the Ninth Circuit reversed the BIA's decision that a Bangladeshi citizen who was vice president of the Jatiyo political party failed to establish eligibility for asylum based on his political opinion. The court held that the evidence of attacks, threats and detention by supporters of the Bangladesh Nationalist Party (BNP) and the murders by BNP supporters of Nabi's son and brother, both of whom were also active in the Jatiyo party, compelled the conclusion that Nabi had established a well-founded fear of persecution. The court further found that the absence of any alternative motive for the murders compelled the conclusion that they were on account of political opinion. Finally, it held that the evidence of improved conditions in Bangladesh did not refute specific proof of a well-founded fear. The court remanded the case, ordering the BIA to consider Nabi's eligibility for withholding of deportation and to exercise its discretion on his asylum application.

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■Ninth Circuit Reverses BIA's Denial Of Asylum To Indo-Fijian

In ***Mustapha v. INS***, No. 98-70655 (9th Cir. Nov. 5, 1999) (unpublished), the Ninth Circuit (Reinhardt, W. Fletcher, O'Scannlain, dissenting) reversed the BIA's decision denying asylum to an Indo-Fijian who was arrested by the native Fijians who forced him to open his business in violation of an ordinance and who burned down his house and business. The court held that the record compelled the conclusion that Mustapha was the victim of past persecution, that country conditions had not sufficiently changed to rebut the presumption of well-founded fear of persecution, and that the future persecution would be on account of his political opinion and race. It remanded to the BIA with instructions to exercise discretion over the asylum application and to reconsider its denial of withholding of deportation.

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MOTIONS

■First Circuit Holds That BIA's *Sua Sponte* Authority To Reconsider Is Committed To Its Unfettered Discretion

In ***Luis v. INS***, __F.3d__, 1999 WL 997805 (1st Cir. Nov. 8, 1999), the First Circuit (Torruella, *Bownes*, Lynch) held that the court lacked jurisdiction to review the petitioner's claim that the BIA failed to exercise its discretion to reconsider *sua sponte* its denial of her motion to reopen her deportation proceedings. The BIA denied Luis's motion to reconsider as untimely. Luis argued that the BIA should have invoked its authority under 8 C.F.R. ' 3.2(a) to reopen or reconsider cases irrespective of timeliness. The court found that it could not entertain the claim because Luis had failed to exhaust administrative remedies. However, it further found that even if the claim had been properly before the court, "the decision of the BIA whether to invoke its *sua sponte* authority is committed to its unfettered discretion." The court found that the regulation did not provide guidelines or standards which dictate how and when the BIA should invoke its *sua sponte* power, and thus, under *Heckler v. Chaney*, 470 U.S. 821 (1985), was not subject to review by the court.

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■Ninth Circuit Orders BIA To Waive Alien's Failure To File Application For Adjustment To Permanent Resident Status Where INS Did Not Respond To Motion To Remand

In ***Konstantinova v. INS***, __ F.3d__, 1999 WL 1011868 (9th Cir. Nov. 9, 1999), the Ninth Circuit (*B. Fletcher*, Nelson, Brunetti) reversed the BIA's denial of a motion to remand and remanded with instructions to waive the alien's failure to file her application for adjustment to permanent resident status with the motion to remand. While her appeal was pending before the BIA, Konstantinova moved to remand her case to an Immigration Judge to permit her to apply for adjustment of status based on an approved visa petition. The INS did not respond. The BIA denied the motion for failure to include the form used to apply for adjust-

(Continued on page 9)

Summaries, Federal Court Decisions

(Continued from page 8)

ment, distinguishing the case from *Matter of Yewondwosen*, Int. Dec. 3327 (BIA 1997), where the BIA waived the same defect and the INS joined the motion. The court held that the BIA made too much of the difference between joining a motion and refraining from opposing a motion, and reversed, concluding that in view of *Yewondwosen*, the denial of Konstantinova's remand motion was arbitrary.

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JURISDICTION

■First Circuit Holds That District Courts Retain Habeas Corpus Jurisdiction To Review Certain Challenges To Final Deportation Orders Governed By IIRIRA's Transition Rules, And That Application Of AEDPA ' 440(d) To Alien In Proceedings At The Time Of Its Enactment Was Impermissibly Retroactive

In ***Wallace v. Reno*** and ***Lemos v. INS***, __ F.3d.__, 1999 WL 959538 (1st Cir. Oct. 26, 1999), the First Circuit (*Boudin*, Coffin, Campbell) held that the Supreme Court's decision in *Reno v. American-Arab Anti-Discrimination Committee*, 119 S. Ct. 936 (1999), did not require it to alter its holding in *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998), that district courts could review pure legal or constitutional challenges to the final deportation orders of criminal aliens who were jurisdictionally barred from filing petitions for review in the courts of appeals. Petitioners, criminal aliens, had been placed in deportation proceedings prior to the enactment of AEDPA, applied for a waiver of deportation under INA ' 212(c) after AEDPA's enactment, and were deemed ineligible because of AEDPA ' 440(d) (rendering criminal aliens ineligible for waiver of deportation). The court held that 440(d) did not apply to aliens who were placed in proceedings prior to its enactment and that, deportation proceedings are commenced, for purposes of retroactivity analysis, when the INS serves the alien with the Order to Show Cause and not when the Order to Show Cause is filed with the Executive Office of Immigration Review.

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■Seventh Circuit Affirms Dismissal Of Habeas Corpus Petition Pursuant To INA ' 242(g)

In ***Botezatu v. Perryman***, __F.3d__, 1999 WL 970793 (7th Cir. Oct. 21, 1999), the Seventh Circuit (Coffey, Easterbrook, *Rovner*), held that the district court correctly concluded that INA ' 242(g) divested it of *habeas corpus* jurisdiction to review the denial of petitioner's requests for a stay of deportation, reinstatement of voluntary departure, and humanitarian parole. The court held that the denial of a stay of deportation is one of the decisions or actions of the Attorney General that falls within the scope of ' 242(g).

The court also held that the Attorney General's refusals to reinstate voluntary departure and grant humanitarian parole are "relevantly analogous" to the "no deferred action decisions" cited by the Supreme Court in *AADC v. Reno*, and therefore also fall within the scope of ' 242(g).

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■First Circuit Holds That 309(c)(4)(E) Precludes Jurisdiction Over Discretionary Decisions

In ***Bernal-Vallejo v. INS***, __F.3d__, 1999 WL 980300 (1st Cir. Nov. 2, 1999), the First Circuit (*Lynch*, Torruella, Bownes) held that it lacked jurisdiction over the petition for review under IIRIRA ' 309(c)(4)(E) (precluding appeal of discretionary decisions). The court held that ' 309(c)(4)(E) precludes jurisdiction where (a) the agency decision being reviewed is a "decision under" one of the enumerated sections, and (b) the agency decision rests on a ground that is committed to agency discretion. It also found that ' 309(c)(4)(E) precluded jurisdiction over the challenge to the BIA's decision that petitioner had not demonstrated extreme hardship, a requirement for suspension of deportation.

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■District Court Orders Immediate Release Of Deportable Alien Accused Of Threats Against Attorney General

In ***Kiareldeen v. Reno***, 1999 WL 956289 (D.N.J. Oct. 20, 1999), the district court (Walls, J.) granted the alien's *habeas* petition and ordered his immediate release. The INS had opposed the alien's adjustment application and detained him based on classified evidence showing, *inter alia*, that he had threatened the life of the Attorney General. The district court held that although the Attorney General had discretionary authority to detain the alien, and the statute authorized the use of classified evidence to deny bond requests, the use of undisclosed evidence to detain petitioner violated his due process rights. Following the INS' decision not to certify to the Attorney General an October 15, BIA decision granting petitioner's adjustment application, the petitioner was released from detention.

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CASES SUMMARIZED IN THIS ISSUE

QUOTABLE QUOTES

"A reviewing tribunal should not be forced into a needless search for an evanescent needle in a haystack merely because an appellant, whether for tactical reasons or out of sheer indolence, neglects to shed light upon the grounds." *Athehortua-Vanegas v. INS*, 876 F.2d 238 (1st Cir. 1989).

NOTED WITH INTEREST

■ A recent newspaper story reported on the case of a United States citizen who has applied for asylum in Canada. According to the story, the "29-year-old New York woman, facing 10 years to life in prison on charges of watering 'medicinal marijuana' plants," claims that she is a political victim of American's marijuana wars. The woman is apparently accused of watering 4,000 marijuana plants being grown at the home of a wealthy, Bel Air, California man, who is also a marijuana activist.

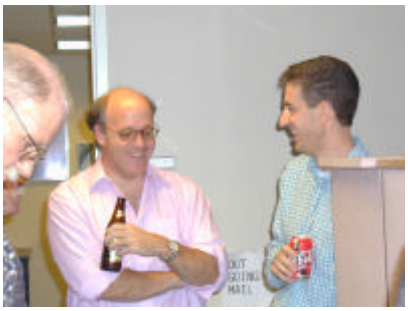
■ Amnesty International has issued another report criticizing the United States' policy of detaining asylum seekers. The report entitled, "Lost in the labyrinth: Detention of asylum seekers," finds that "the structure, rules and apparent priorities of the INS fail to meet the needs of people who seek protection from persecution in other countries." Amnesty International also finds that the INS detention system is "seriously flawed." The Amnesty report is available on line at:

www.amnesty.org

INSIDE OIL

OIL Holiday Office Party will be held on December 16, 1999, at 3:00 p.m., at National Place, Suite 7003. Join us if you're in town.

OIL will be holding the Tenth Annual White Elephant Game. The game will be held on Dec. 16 at 1 pm, in the 7260N suite. To participate contact David McConnell at 202-616-4881.



Pictured above – scene from Brad Glassman's going away party.

TRAINING ANNOUNCEMENT

OIL will be holding a seminar on denaturalization litigation on February 24-25, 2000. Contact Francesco Isgro at 202-616-4877 for additional information

The goal of this monthly publication is to keep litigating attorneys within the Department of Justice informed about immigration litigation matters and to increase the sharing of information between the field offices and Main Justice. If you have any suggestions, or would like to submit a short article, please contact Francesco Isgro at 202-616-4877 or at francesco.isgro@usdoj.gov. The deadline for submission of materials is the 20th of each month.

The following attorneys have contributed to this issue: Thomas Hussey, Alice Loughran, John Cunningham, Chris Pickrell.

If you are not on our mailing list, please contact Mary Coates ☎ **202-616-4900**

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